

**Meeting Date: November 6**

**Agenda Item No. 7**

**Agenda Item: Rules Process Presentation**

**Bureau Chief Approval: \_\_\_\_\_**

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**Background:**

The Commission has two methods to adopt enforceable provisions for wildlife management. The methods are proclamations and rules.

Idaho Code Section 36-105(3) excepts the Commission from formal rulemaking “when adopting, repealing, or amending any proclamation relating to setting of any season or limit on numbers, size, sex or species of wildlife classified by the commission as game animals, game birds, furbearers, migratory birds, salmon, steelhead and resident fish which may be taken in this state ....”. In summary, these are the “biological rules” that the Commission adopts to implement fishing, hunting, and trapping seasons. These are implemented by proclamation without prior legislative review.

The Commission also has authority to adopt rules governing “nonbiological” issues such as methods of take, harvest reporting, and license and tag requirements. Unlike the process for biological rules (technically proclamations), nonbiological rulemaking must follow provisions of formal rule procedure. In the past, the Commission has used a hybrid method of rulemaking that incorporated both temporary and proposed rule procedure. This method allowed the Commission to first adopt and immediately implement a nonbiological issue as a temporary rule without legislative review. However, because a temporary rule is only effective until the end of the next legislative session, the Commission would follow up with a proposed rule. The proposed rule would subsequently be adopted as a pending rule for legislative review to become permanent if legislatively approved. This hybrid method has provided synchrony in the adoption and implementation of biological and nonbiological rules pursuant to a calendar year or a specific season.

The Commission must receive the Governor’s approval to adopt a temporary rule; approval has been fairly routine in the past for a diversity of nonbiological rules. The Department has used a criterion of conferring a benefit to justify temporary rulemaking. This is one of three qualifying criteria in the Administrative Procedures Act (APA) and was deemed a sufficient justification in the past. However, a temporary rule can only be adopted and made enforceable if it is used in “emergency” situations and is in effect for a specific period of time. Recently, requests for temporary rulemaking for nonbiological issues were deemed unjustified in regard to meeting the emergency situation required for temporary rule approval. Thus, the Commission recently proceeded to conduct proposed rulemaking for a slate of nonbiological rules at their July and August meetings. However, proposed rules cannot be implemented until after legislative review and approval. For example, nonbiological rules adopted in July and August, 2008 will be reviewed by the 2009 Legislature and implemented in the spring, 2009 if legislatively approved. The implementation lag from the proposed rule process can result in a disassociation of nonbiological rules, such as establishing nonresident tag quota or weaponry changes, from the season for which they were proposed. Another result of the implementation lag can be that sportsmen expectations for taking advantage of certain rules in an upcoming season, such as weaponry changes, are not met.

An additional timing issue is that the Department has not fully adhered to the rule moratorium enacted during the legislative session, which must be addressed.

**Statutory Authority and/or Policy issues:** The general expectation that most nonbiological rules do not qualify for temporary rule procedures requires revision of the traditional schedule of rulemaking to ensure proposed rules are reviewed during the following legislative session. It will also require educating sportsmen to understand new timelines for implementation of nonbiological rules to modify expectations of immediate implementation. The Commission, staff, and sportsmen need to understand aspects and outcomes of the proposed rule process for nonbiological rules to establish appropriate timelines for rulemaking, including public input.

**Public Involvement Process:**

None. There has been discussion with Division of Financial Management, the Governor's Office, the Attorney General's Office and the Department of Administration about this issue.

**Staff Recommendation:**

Revise the traditional calendar for nonbiological rulemaking to integrate a proposed rule rather than a temporary/proposed rule process for most nonbiological rules. Communicate with sportsmen to explain new timelines and process for implementation.

**Justification:** Understanding of rule process expectations and outcomes is needed prior to setting the 2009 Commission calendar.